

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





BRIEF FOR APPELLANT

---

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,143

967

HERBERT MACKLIN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

---

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED MAR 13 1968

*Mallen J. Paulson*  
CLERK

Robert E. Sher  
888 17th Street, N. W.  
Washington, D. C.

Attorney for Appellant  
(Appointed By This Court)

STATEMENT OF QUESTION PRESENTED

A liquor store was robbed by two armed men, both identified, one of them being appellant's father. The Government's proof established, without dispute, that appellant was neither in the liquor store nor one of the robbers.

Is the fact that appellant was with the two men, approximately an hour after the robbery, in a car which had been parked near the liquor store at the time of the robbery, with a substantial sum of unexplained funds in his possession, sufficient to sustain a conviction of robbery of the liquor store and assault with a dangerous weapon therein.

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,143

HERBERT MACKLIN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

---

BRIEF FOR APPELLANT HERBERT MACKLIN  
ON APPEAL FROM JUDGMENT OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT  
OF COLUMBIA

INDEX AND TABLE OF CASES

|                                                                                                       | <u>Page</u> |
|-------------------------------------------------------------------------------------------------------|-------------|
| STATEMENT OF QUESTION PRESENTED.....                                                                  | i           |
| TITLE PAGE.....                                                                                       | ii          |
| INDEX AND TABLE OF CASES.....                                                                         | iii-iv      |
| JURISDICTIONAL STATEMENT.....                                                                         | 1           |
| STATEMENT OF THE CASE.....                                                                            | 1-13        |
| STATUTES, TREATIES, REGULATIONS<br>OR RULES INVOLVED.....                                             | 14          |
| STATEMENT OF POINTS.....                                                                              | 15          |
| SUMMARY OF ARGUMENT.....                                                                              | 15-17       |
| ARGUMENT.....                                                                                         | 18-29       |
| THE EVIDENCE IS INSUFFICIENT TO SUSTAIN<br>THE JURY'S VERDICT OF GUILTY AS TO THIS<br>APPELLANT. .... |             |
| CONCLUSION.....                                                                                       | 29          |

TABLE OF CASES

|                                                                                    | <u>Page</u> |
|------------------------------------------------------------------------------------|-------------|
| * <u>Austin v. United States</u> (D. C. Cir.)<br>382 F. 2d 129.....                | 18          |
| <u>Borum v. United States</u> (D. C. Cir.)<br>380 F. 2d 595 .....                  | 18          |
| * <u>Campbell v. United States</u> , 115 U.S. App. D.C. 30,<br>316 F. 2d 681 ..... | 24-25       |
| * <u>Cephus v. United States</u> , 117 U.S. App. D.C. 15,<br>324 F. 2d 893 .....   | 18          |
| * <u>Cooper v. United States</u> , 94 U.S. App. D.C. 343,<br>218 F. 2d 39.....     | 23-24       |
| * <u>Cooper v. United States</u> , 123 U.S. App. D.C. 83,<br>357 F. 2d 274.....    | 26-27       |
| * <u>Goodwin v. United States</u> , 121 U.S. App. D.C. 9,<br>347 F. 2d 793.....    | 25-26       |
| <u>Hiet v. United States</u> , 124 U.S. App. D.C. 313,<br>365 F. 2d 504.....       | 27-28       |
| <u>United States v. Garguilo</u> (2 Cir.)<br>310 F. 2d 249.....                    | 27          |
| * <u>United States v. Garrett</u> (7 Cir.), 371 F. 2d 296 ...                      | 28          |
| <u>Wilson v. United States</u> (D. C. Cir.)<br>366 F. 2d 666.....                  | 28          |

\*Cases chiefly relied upon are marked by asterisks.



JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered upon a verdict of guilty of violations of Title 22, District of Columbia Code, Sec. 2901, Robbery, and of Title 22, District of Columbia Code, Sec. 502, Assault with a Dangerous Weapon.

The District Court had jurisdiction under Title II, District of Columbia Code, Sec. 521. This Court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1291.

STATEMENT OF THE CASE

An indictment was returned in June of 1966 charging appellant Herbert Macklin and his father, Frank M. Macklin, Jr., with robbery and assault with a dangerous weapon. The indictment was in 6 counts. Counts 1 and 3 charged that on April 9, 1966, the two defendants stole property of the K-R Corporation of a value in excess of \$2700. Counts 2, 4 and 5 charged that the two defendants, on that date, made an assault with a dangerous weapon, e.g., a sawed-off shotgun,

on Rosalind Gertler, Robert L. Gregory, and Bob Gertler. Count 6 charged defendant Frank M. Macklin, Jr. (but not this appellant) with possession of an unregistered firearm, e.g , a sawed-off shotgun

Following denial of motions for suppression of evidence and for a separate trial for each of the defendants, the case went to trial before Judge Walsh and a jury on March 14, 15 and 16, 1967. On the latter date the jury returned a verdict of guilty on the first 5 counts against this appellant and on all 6 counts against his co-defendant. On May 24, 1967, Judge Walsh sentenced this appellant, pursuant to the provisions of the Federal Youth Corrections Act, Sec. 5010(c) of Title 18 of the United States Code, for a period not to exceed 10 years on each of the 5 counts; said sentences to run concurrently. This appeal followed.

At the trial the Government's evidence was as follows:

Robert L. Gregory testified that he was employed as a clerk and delivery man by the Wilcox Liquor Store located at 3225 Georgia Avenue, N. W. in the District of Columbia (Tr. 51-52); that on April 9, 1966, as he was making deliveries, he noticed a red Corvair car with three persons

in it parked in front of the store around 7:30 or 8 o'clock that evening (Tr 53); that upon his return from a delivery between 8:30 and 9 that evening he noticed that the same car was parked in the alley toward the rear of the store, with one person sitting in it on the passenger side in the front seat (Tr. 53-54); that he became suspicious and was about to jot down the numbers on the license plate but, not having a pencil, he remembered the first four digits which were 194-6 (Tr 53); that as he was going into the store he noticed two men in the phone booth just outside the store (Tr. 54); and that very soon thereafter the same two men came into the store (Tr 54). Gregory then noticed that one of the men, who was wearing a greenish coat, had a pistol, so he started out of the store to reach the phone (Tr. 55). As he did so the other man, who was wearing a light colored coat, showed Gregory a shotgun and said, "If you want to be smart, you will come on back in " (Tr. 55). Gregory came back into the store and was directed by the man with the shotgun to go to the rear of the store where the money in his possession was taken from him and he was told to lie down (Tr. 55). A total of \$45 or \$50 was taken from him (Tr. 58).



Not too long thereafter, Gregory's boss and his wife were brought to the rear of the store and one of the two men said to Gregory, "I ought to kill you for being so smart " (Tr. 55-56). Gregory's boss pleaded with the gunman not to hurt Gregory (Tr 56-57).

Gregory identified Frank M. Macklin, Jr. as the man with the shotgun (Tr 59-60). He stated positively that appellant Herbert Macklin was not the man with the pistol (Tr 60), and identified a picture (Government Exhibit No. 2) as that of the man who had the pistol (Tr. 61).

Gregory testified that he did not see the face of the third man in the car and that the only thing he noticed about this man's clothing was that he had on a light shirt or coat (Tr. 57-58) When Gregory observed the car parked to the rear of the store this third man was sitting on the passenger side in the front seat (Tr. 54). He noticed that there were some clothes or something hanging on one of the sides of the car, like it had just come from the cleaners (Tr 58).

Gregory testified that the day after the robbery he identified Frank Macklin, Jr. in a police lineup as one of

the holdup men and later identified the man with the pistol in the morgue (Tr. 63-64). On cross-examination, Gregory testified that he could only see the back of the head of the man who was sitting in the car when it was parked at the rear of the store (Tr. 91). He couldn't tell whether it was a man or a boy (Tr. 121-2). He has never identified appellant Herbert Macklin as being present at the robbery (Tr. 122).

Robert Gertler, a co-owner of the K-R Corporation which operates the Wilcox Liquor Store, testified that at about 10 P.M. on Saturday, April 9, 1966, while he was busy filling out his cigarette order, he heard someone say to his wife, "Give me all your money" (Tr. 130-2). He turned around and saw somebody leaping across the counter with a revolver in his hand (Tr. 132). The man told Gertler to walk alongside of him and made Gertler's wife take all of the money out of the safe and give it to him (Tr. 132). The man stuffed the money into his pockets (Tr. 132). He then told Gertler and his wife to get into the back room, where Gertler saw Gregory lying face down on the floor (Tr. 132-3). The man with the revolver pointed it at

Gregory's head and said, "I should take care of you" (Tr. 133). Gertler pleaded with him not to.

Shortly after the two men left Gertler called the police, who arrived in a matter of minutes (Tr. 133-34). Gertler saw the man with the shotgun standing near the refrigerator which was toward the back of the store (Tr. 134). He identified Frank Macklin, Jr. as the man with the shotgun (Tr. 139-40). He also identified a picture (Government Exhibit No. 2) as that of the man with the revolver (Tr. 138). He testified that about \$2600 in cash was taken from the store, together with two bottles of whiskey which he was able to identify because the store's stamp was on the bottles (Tr. 136-8).

He never saw appellant Herbert Macklin in the store (Tr. 140).

Edward L. Dory, a police officer assigned to plain-clothes duty at the 13th Precinct, testified that on the night of April 9, 1966, he was on duty in a vehicle with Officers Childers and Denham (Tr. 159-60). At about 10:05 P.M. they received a radio lookout for a holdup that had occurred at Wilcox Liquors in the 3200 block of Georgia Avenue,

N. W. (Tr. 160). Shortly after that they got a description of the car, a Corvair, with 194-6 as the first four numbers of the license plate (Tr. 160-1). While cruising in the 2000 block of 1st Street, N. W. they observed a car matching the description (Tr. 161). This car was heading south and the police car was heading north (Tr. 161). The police car made a U-turn, got behind the Corvair and, after noting that the full tag number was 194-674, pulled up to the door of the Corvair (Tr. 161-2). The Corvair then made a U-turn and headed south on 1st Street. Officers Childers and Denham jumped out of the police car and shouted for the other car to stop (Tr. 162). Officer Dory brought the police car to a stop and went over to the Corvair, where Officers Childers and Denham were ordering the occupants out (Tr. 162). Frank Macklin was behind the wheel of the Corvair (Tr. 162-3), Herbert Macklin was on the passenger side on the front seat (Tr. 163), and Donald Brown was sitting in the back seat directly behind the driver (Tr. 164).

When Officer Dory got to the Corvair, he ordered appellant Herbert Macklin out and began searching him (Tr. 164). At this time Officer Dory noticed that appellant had his hand



in his pocket and it seemed like a big bulge; and then appellant pulled a package out of his pocket (Tr. 164). Officer Childers was holding Brown, who began to scuffle and attempt to escape (Tr. 164). Frank Macklin began to struggle with Officer Denham and appellant began to struggle with Officer Dory (Tr. 164-5). Brown broke loose from Officer Childers and Officer Dory heard a few shots fired (Tr. 165). While Officer Dory was trying to hold appellant, money which appellant had in his hand began to scatter all over the street (Tr. 165). It was a windy night and the money was blowing under the cars and on the seat and on the ground and down the street (Tr. 165).

While Officer Dory and a detective from the robbery squad were holding appellant, Officer Dory noticed the butt of a gun with adhesive tape on it sticking out from under the front seat (Tr. 165-6). On the front seat there were two bottles of whiskey, a fifth of I. W. Harper and a pint of Old Granddad (Tr. 165-6). There was also a lot of change on the front seat (Tr. 166). There was a small 32 caliber pistol, which was loaded, under the front seat (Tr. 166). The money that was scattering all over the place came from

appellant's hand (Tr. 166). He had previously had it in his left rear pocket (Tr. 166). A number of police officers and a few honest citizens helped pick up the money which had been scattered (Tr. 170). It was mostly in \$5 and \$10 bills, with a few \$20's (Tr. 171). Approximately \$1275 was recovered

Officer Dory testified that appellant had on a sweater-type jacket which had a suede front and a light cream or tan background (Tr. 173). The front part was dark (Tr. 173). From the back it looked like it was cream or tan, kind of light colored (Tr. 173-4).

About an hour had elapsed between the time of the robbery and the time when the Corvair with the three men in it was stopped (Tr. 178-9). The radio lookout that Officer Dory and the other two police officers got contained a description of individuals (Tr. 189). Those descriptions did not fit appellant Herbert Macklin (Tr. 189). Officer Dory found no weapons on appellant (Tr. 196).

Detective Freeman N. Childers' testimony corroborated that of Officer Dory with respect to the radio flash lookout and the spotting and stopping of the Corvair (Tr. 200-2).



He testified that as he approached the Corvair he observed appellant trying to push something underneath the seat or hiding something under the seat (Tr. 202). When questioned further about this on cross-examination, he testified that he didn't know if appellant was pushing something under the seat or just bending over (Tr. 212-13). Detective Childers testified that there was a white cleaners bag hanging up on the left side of the Corvair (Tr. 202-3). In the front seat were two bottles of whiskey, a fifth of I. W. Harper and a pint of Old Granddad (Tr. 203). Detective Childers was in the process of searching Donald Brown when Brown broke loose and started to run. The detective ordered Brown to stop, then fired first one shot at him and later two more (Tr. 203).

Detective Childers noticed money being spread all over the street and in the car (Tr. 204). Donald Brown had money in each of the pockets of his jacket (Tr. 204). There was money on the front seat of the car (Tr. 204). Brown was located in the rear yard at 117 V Street, N. W. (Tr. 204).

Appellant was dressed in a sweater or a pullover shirt that was dark in front and light in the back (Tr. 205).

The above sets forth all of the evidence introduced by the Government in the case. Counsel for appellant Herbert Macklin moved for an acquittal at the conclusion of the Government's case, which was denied (Tr. 248-9).

Appellant thereupon took the stand in his own defense and testified as follows:

He is 19 years of age and lives with his mother at 439 Orange Street, S. E. in the District of Columbia (Tr. 218). On April 9, 1966, he was in Joe's Poolroom at 15th & East Capitol until some time between 9:30 and 10 that night (Tr. 219). He left the poolroom and, after riding on a couple of buses, got off at 1st and Florida Avenue, N. W. (Tr. 219-20). He went into a liquor store near the bus stop and bought a pack of cigarettes (Tr. 220). When he came out of the liquor store he saw his father driving his mother's car up Florida Avenue (Tr. 221). His father was alone in the car at the time. When he stopped the car at a red light on the corner, appellant got in (Tr. 221). This was about 10 o'clock or 10:15 at night (Tr. 220).

Appellant's father made a right turn on 1st Street and drove to 1st and P (Tr. 221). There Donald Brown, whom

appellant knew as "Turk", hailed the car and got in the back seat (Tr. 221-2). Brown was carrying a brown bag, something like a Safeway Store shopping bag, in his right arm (Tr. 221). Brown set two liquor bottles between appellant and his father and offered them a drink, which was refused (Tr. 222). At Brown's request, appellant's father made a U-turn and was driving the car up 1st Street (Tr. 222). At 1st and V the police car pulled up behind them (Tr. 222). Appellant's father made a U-turn and stopped the car (Tr. 223). Officer Denham pointed a pistol at appellant's father's head and told him to get out (Tr. 223). Brown also got out of the car and, when Officer Dory came up, appellant slid across the front seat and got out of the car on the driver's side (Tr. 223-4). Officer Dory directed appellant to put his hands on top of the car, which he did, and the officer then proceeded to search him (Tr. 224). The officer reached into appellant's right pocket and pulled out his money, papers, draft cards, and the like (Tr. 224). About this time Donald Brown broke loose from Officer Childers and started to run (Tr. 224). Officer Childers fired at Brown (Tr. 224-5). Officer Denham pushed appellant's

father to the ground and appellant asked him to stop (Tr. 225). Appellant testified that he was not struggling to escape (Tr. 225).

Appellant further testified that he did not participate in the robbery of the Wilcox Liquor Store in any way (Tr. 226); and that he was not present in the vicinity of, or inside, the liquor store at any time that evening (Tr. 226-7).

On cross-examination he testified that he had about \$75 in his pocket, consisting of about two 10's and the rest 5's and 1's (Tr. 229). Some of it was money he had earned and some had been given to him by his mother (Tr. 229). He was wearing a sweater, light colored in the back and dark in the front (Tr. 238).



STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED

22 D. C. Code §2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months or more than fifteen years

22 D. C. Code §502. Assault With Intent To Commit Mayhem Or With Dangerous Weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.



STATEMENT OF POINTS

1. The Evidence Is Insufficient To Sustain The Jury's Verdict Of Guilty As To This Appellant.

SUMMARY OF ARGUMENT

Two armed men robbed a liquor store at 3225 Georgia Avenue, N. W. in the District of Columbia, at about 10 P.M. on the night of April 9, 1966. Both of these men were identified by eye witnesses, one of them being appellant's father. All of the eye witnesses testified that appellant was not in the liquor store and was not one of the robbers.

For some time before the robbery a red Corvair had been parked in front of the store with three men in it. Shortly before the robbery the car was parked in the rear of the liquor store, with one person in it sitting on the right hand side on the front seat. That person was not identified. One of the eye witnesses to the robbery remembered the first four digits of the license plate of the Corvair and supplied the numbers to the police.

Approximately an hour after the robbery the red Corvair was stopped by the police in another part of town. Appellant's father was driving, appellant was sitting to his right and Donald Brown, identified as one of the robbers, was in the rear. There was evidence that appellant had in his possession a large amount of currency which he threw away and which was scattered about by the wind. When it was gathered up, it totaled about \$1275. Appellant's testimony was that he had only about \$75 with him and that some of this got scattered about in the course of the arrest.

Appellant was convicted on two counts of robbery and three counts of assault with a dangerous weapon. Since appellant was concededly not in the liquor store during the robbery, the only theory on which he could be held to have participated was as an aider and abetter.

Under the decisions of this Court, the sufficiency of the evidence to sustain a conviction must be judged by the record as it stood at the close of the Government's case. At that stage of the proceedings the only thing pointing to appellant's participation in the robbery was his presence

in the car about an hour after the robbery with the two men identified as the robbers, with a substantial sum of money in his possession.

With the Government having the burden of establishing each and every element of the offenses beyond a reasonable doubt, its proof was not sufficient to meet that burden. It is as reasonable to infer that appellant was picked up by his father some time after the robbery and the money turned over to him at that time as it is to infer that appellant was the unidentified third man in the Corvair when it was parked near the liquor store. The proof falls short of establishing beyond a reasonable doubt that appellant participated in the criminal act "before or at the time it was committed " While his possession of the money may have been grounds for suspicion, under the decided cases that is not enough.

A directed verdict of acquittal should have been granted.

ARGUMENT

The Evidence Is Insufficient To Sustain The  
Jury's Verdict Of Guilty As To This Appellant.

Whether or not there is sufficient evidence to sustain a verdict of guilty must be determined on the basis of the evidence as it stood at the conclusion of the Government's case

Cephus v. United States, 117 U.S. App. D.C. 15,  
324 F. 2d 893 (1963)

Borum v. United States, 380 F. 2d 595, 596 (1967)

Austin v. United States, 382 F. 2d 129, 138 (1967)

In Cephus this Court said (324 F. 2d at 895):

Accordingly, Rule 29(a) of the Federal Rules of Criminal Procedure provides that a motion for judgment of acquittal must be granted "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction." Denial of such a motion at the close of the Government's evidence is not immediately reviewable. Nevertheless, if defendant then rests or if he introduces evidence which adds nothing to the Government's evidence, the sufficiency of the Government's case-in-chief may be reviewed on the appeal from a conviction. (Emphasis added)

In Austin, supra, this Court said (382 F. 2d at 138):

A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime. We consider this issue on the basis of the evidence as it stood at the conclusion of the Government's case . . . (Emphasis added)



What did the evidence show at the close of the Government's case? A liquor store had been robbed by two armed men at about 10 P.M. on April 9, 1966. Some \$2700 in cash was taken, in addition to two bottles of liquor. The two armed robbers were positively identified by two eye witnesses. Both of the witnesses testified positively that this appellant was not one of them.

There was evidence that a red Corvair with three men in it had been parked in front of the liquor store earlier in the evening and that, shortly before the robbery, the same car was parked to the rear of the liquor store with one person sitting in it on the right hand side of the front seat. This person was not identified, except to the extent that the witness testified that he was wearing a light colored shirt or coat, a description that would probably fit half of the male population of Washington. Indeed, the one witness who testified to the presence of this person in the parked car was unable to say whether he was a man or a boy (Tr. 121-2).

Approximately one hour after the robbery the red Corvair was stopped by the police a considerable distance away



from the point of the robbery. This appellant was in the front seat on the right side, his father was driving and Donald Brown, who had been identified as one of the robbers, was sitting in the rear. There was evidence that appellant pulled some money out of his pocket (the exact amount not being known) which he scattered about the street in the wind. Appellant testified that he had approximately \$75 in his possession at the time, part of which he earned and part of which he received from his mother. The Government's evidence was that the amount of money in his possession was very substantially more. Viewing this evidence in the light most favorable to the Government, a jury would be warranted in finding that appellant had in his possession a substantial amount of money from some unexplained source. Of course, there was no way to establish the fact that the money in appellant's possession was the identical money that was taken from the liquor store an hour earlier; and no attempt was made to do so. A shotgun and a pistol were found under the front seat of the Corvair but, whereas appellant's father was charged with unlawful possession of the shotgun, no such charge was made against appellant with respect to either the shotgun or the pistol.

In this state of the record, it is submitted that the evidence was insufficient on which to base a finding that this appellant participated in the robbery of the liquor store or that he made an assault with a dangerous weapon upon any of the persons therein. It is perfectly clear that appellant did not assault anyone. He never even entered the liquor store. He did not take anything by force or violence. He did not put anyone in fear. The only theory on which he could possibly be held to have participated in the robbery is as an aider and abetter. But that would require a finding that he was the third man in the Corvair when it was parked in front and to the rear of the liquor store before and during the robbery; and there is no evidence to support such a finding.

The court below instructed the jury as follows with respect to the offense of aiding or abetting (Tr. 325):

Now, if two or more persons act jointly or in concert, each performing a part that results in the commission of the offense, then each is actually guilty.

However, the mere fact that one is present at the scene of a crime, even though he may be in sympathy with the person committing it, will not render him an aider or abetter.

Now the jury must find beyond a reasonable doubt that the defendant Herbert Macklin, that this defendant was present at the scene of the crime, the Wilcox Liquor Store; that he actually or constructively, for the purpose of assisting in the crime; that he shared in the criminal intent of the person who committed the crime; that he participated in furtherance of the criminal act, either before or at the time it was committed. (Emphasis added)

On the evidence presented to it, the jury could not find beyond a reasonable doubt that appellant was present at the scene of the crime, that he shared in the criminal intent of the persons who committed it, or that he participated in furtherance of the criminal act either before or at the time it was committed. The fact that he was in the car with the two men who were identified as having committed the robbery is a suspicious circumstance but, as this Court has frequently held, more than suspicion is required to sustain a guilty verdict. If it be said that an inference of participation can be drawn from appellant's possession of the unexplained funds, it may with equal force be inferred that the money was turned over to appellant by his father during the hour between the robbery and the arrest. Whatever else it may be, it would not make appellant an aider and

abetter. It does not constitute participation in the criminal act "before or at the time it was committed."

Appellant testified that he was not anywhere near the liquor store on the night of the robbery and did not participate in it in any way. Whether or not the jury believed him, it is clear that his testimony did not add anything to the proof as it stood at the close of the Government's case-in-chief. And on the basis of the proof as it stood at that time, appellant's motion for a directed verdict of acquittal should have been granted. The following decisions support this position.

In Cooper v United States, 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954), a robbery had been committed by two men. One of them was positively identified. Cooper was not, but his fingerprints were found on the get-away car. There was evidence that Cooper had gone to a cousin and asked her to tell all inquirers that she was with him in North Carolina on the day of the robbery. The cousin was in fact not in North Carolina that day. The court held that Cooper's motion for judgment of acquittal should have been granted, saying (218 F. 2d at 41):



It is clear to us that upon the evidence in the case at bar, a reasonable mind must necessarily have had a reasonable doubt as to Cooper's guilt. The total absence of any semblance of direct proof against Cooper, in the presence of so much direct proof as to the robbery and the robbers, must, we think, make a reasonable man have a reasonable doubt upon the evidence as it stood. That the get-away car was being bought by Cooper, that he was a friend of Bullard, who was clearly one of the robbers according to this record, and that he asked his cousin to corroborate his being in North Carolina, creates suspicion. Such evidence might raise a question in a reasonable man's mind, but that is not enough.

Another case of similar import is Campbell v. United States, 115 U.S. App. D.C. 30, 316 F. 2d 681 (1963). There Campbell and a co-defendant were convicted of robbery. As to Campbell the evidence was entirely circumstantial. No witness, including the victim who had known him for twenty years, testified that Campbell, or anyone resembling him, was at the scene of the crime. There was evidence that he was with his co-defendant, who had been identified as one of the robbers, shortly after the time of the robbery. Campbell's keys were found in his co-defendant's room and his fingerprint was found on the steering wheel of the robbery car. Nonetheless, this Court reversed and remanded with directions to enter a judgment of acquittal, saying (316 F. 2d at 683):



The close association of Simms and Campbell, together with the testimony that they were seen together shortly after the crime, certainly gives rise to a suspicion that Campbell was indeed the unidentified participant with Simms in the robbery. But "[g]uilt, according to a basic principle of our jurisprudence must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence.

In Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F. 2d 793 (1965) the evidence showed that shortly before 8 P.M., three men entered a grocery store in Northeast Washington; one held the owner at gunpoint while the other two took from the cash register about \$300 which they stuffed into a "Sealtest" bag already containing rolls of pennies, which they found under the counter. They also took a check for \$10 and a carton of Camel cigarettes. An hour later in another section of the city, a policeman in a scout car stopped an automobile occupied by four men which was being operated at excessive speed. Upon noticing a pistol on the rear seat, the officer ordered the occupants out of the car and arrested them. A search of the car revealed a "Sealtest" bag containing currency and coins, a carton of

Camel cigarettes, 20 rolls of pennies and a \$10 check.

The grocer unequivocally identified three of the appellants as the men who had robbed him. As to them the convictions were affirmed. But as to the fourth man, who had not been identified by anyone, the conviction was reversed. The court said (347 F. 2d at 795):

It is true that about an hour after the robbery in another part of the city, Paul Vaughn was with the other three appellants in the same automobile the other officer had seen speeding away from a point near the scene of the crime. But in view of his denial of guilt, that was not enough to justify the conclusion beyond a reasonable doubt that he had been the look-out man.

In Cooper v. United States, 123 U.S. App. D.C. 83, 357 F. 2d 274 (1966), the complaining witness was unable to identify Cooper as one of the persons who attacked and robbed him, though he did say that he caught a fleeting glimpse of him just before the robbery. There was testimony that Cooper knew the other two defendants (whose convictions were affirmed) and was with them soon after the crime. Cooper's conviction was reversed and remanded for a new trial. Judge Edgerton was of the view that a judgment of acquittal should have been directed, saying (357 F. 2d at 276):

It appears to me, though not to my colleagues, that a reasonable juror could hardly avoid a reasonable doubt that Cooper was present at the time of the crime, and could not avoid a reasonable doubt that he took part in the crime. Even regardless of the detailed and consistent alibi testimony of Cooper and two girls, I think the Government's evidence was only sufficient to create a reasonable suspicion, or at most a likelihood, that Cooper was guilty. Perhaps the jury could reasonably think he was probably guilty, but this is not enough to support a criminal conviction.

Judge Bazelon was of the view that the evidence against Cooper, while weak, was sufficient "by a hair's breadth" to avoid a directed verdict of acquittal. But because of the closeness of the issue, he held that the trial judge should have pointed out to the jury much more clearly than he did that "identification would establish Cooper's presence only, and that conviction would also require a belief that he joined in the robbery or aided in its commission." He quoted with approval from the opinion of the Court of Appeals for the Second Circuit in United States v. Garguilo, 310 F. 2d 249, that where the charge is aiding and abetting "participation was essential for guilt."

To the same effect is Hiet v. United States, 124 U.S.

App. D.C. 313, 365 F. 2d 504 (1966) where the court said (365 F. 2d at 505):

Unquestionably the print raises a suspicion. But a suspicion, even a strong one, is not enough. Guilt must be established beyond a reasonable doubt, and each and every element of the offense must be established beyond a reasonable doubt. The crime of larceny is that the accused did "take and carry away" something of value. Obviously one element of that crime is that the accused took the property; not that he was at some time in the vicinity of the property but that he took it and carried it away.

See also Wilson v. United States, 366 F. 2d 666 (D.C. Circuit, 1966); and United States v. Garrett, 371 F. 2d 296, 299 (7 Cir., 1966), where on facts closely paralleling those present here the court held that there was "no sufficient evidence to justify conviction of defendant Andrews as an aider and abetter of the alleged robbery."

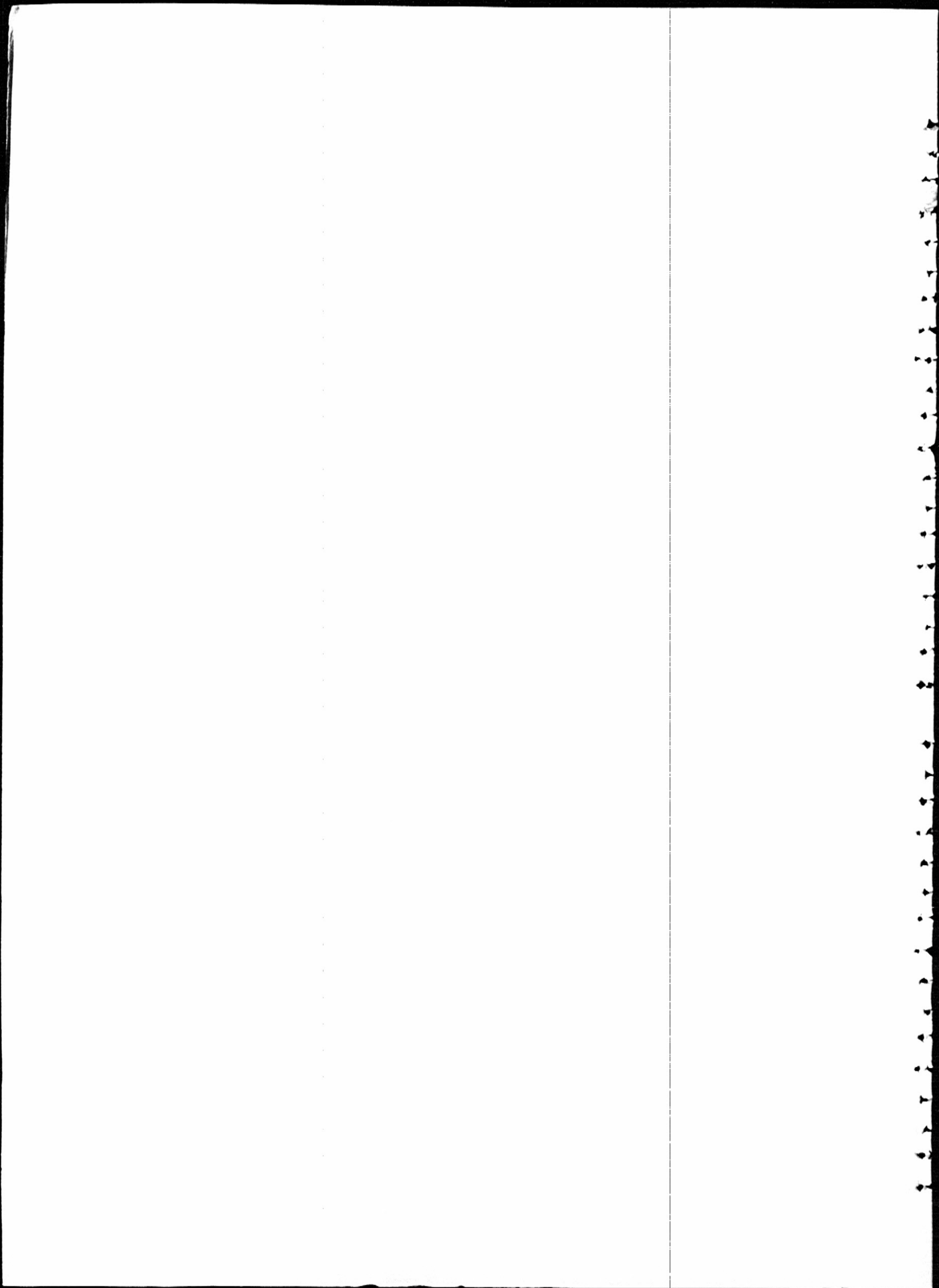
In this case appellant was not the driver of a getaway car. Indeed, there is no evidence that he drove the car at all on the night of the robbery. Nor is there any evidence to indicate that he was a lookout if, indeed, a man in a car parked in the rear of a liquor store where the only entrance to the store is in the front can be so designated. There is nothing to connect appellant with



the robbery either before or at the time it was committed. His only connection with it stems from the fact that, after the event, he was with the men who committed the robbery and had a substantial sum of money in his possession, the source of which was not satisfactorily explained. But it is as reasonable to infer that this money was turned over to him by his father at some time during the hour between the robbery and the arrest as it is to infer that the money was turned over to him at or immediately after the robbery. Since one inference is as valid as the other, and since the Government has the burden of establishing each and every element of the offense beyond a reasonable doubt, it can not be said that the Government has met that burden with respect to the element of appellant's participation in the robbery. While there may be grounds for suspicion, as this Court has repeatedly held, suspicion is not enough.

#### CONCLUSION

For the reasons stated, the conviction should be reversed with directions to enter a judgment of acquittal.



Respectfully submitted,

Robert E. Sher  
888 17th Street, N. W.  
Washington, D. C.

Attorney for Appellant  
By Appointment Of This Court

BRIEF FOR APPELLEE

---

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

\_\_\_\_\_  
No. 21,143  
\_\_\_\_\_

FILED MAY 23 1968

HERBERT J. MACKLIN, APPELLEE

*Nathan J. Paulson*  
CLERK

v.

UNITED STATES OF AMERICA, APPELLEE

\_\_\_\_\_  
No. 21,144  
\_\_\_\_\_

FRANK MACKLIN, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

\_\_\_\_\_  
Appeal from the United States District Court  
for the District of Columbia  
\_\_\_\_\_

DAVID G. BRESS,  
*United States Attorney.*

FRANK Q. NEBEKER,  
WILLIAM G. REYNOLDS,  
*Assistant United States Attorneys.*

Cr. No. 739-66

---



### QUESTIONS PRESENTED

In the opinion of appellee the following question is presented:

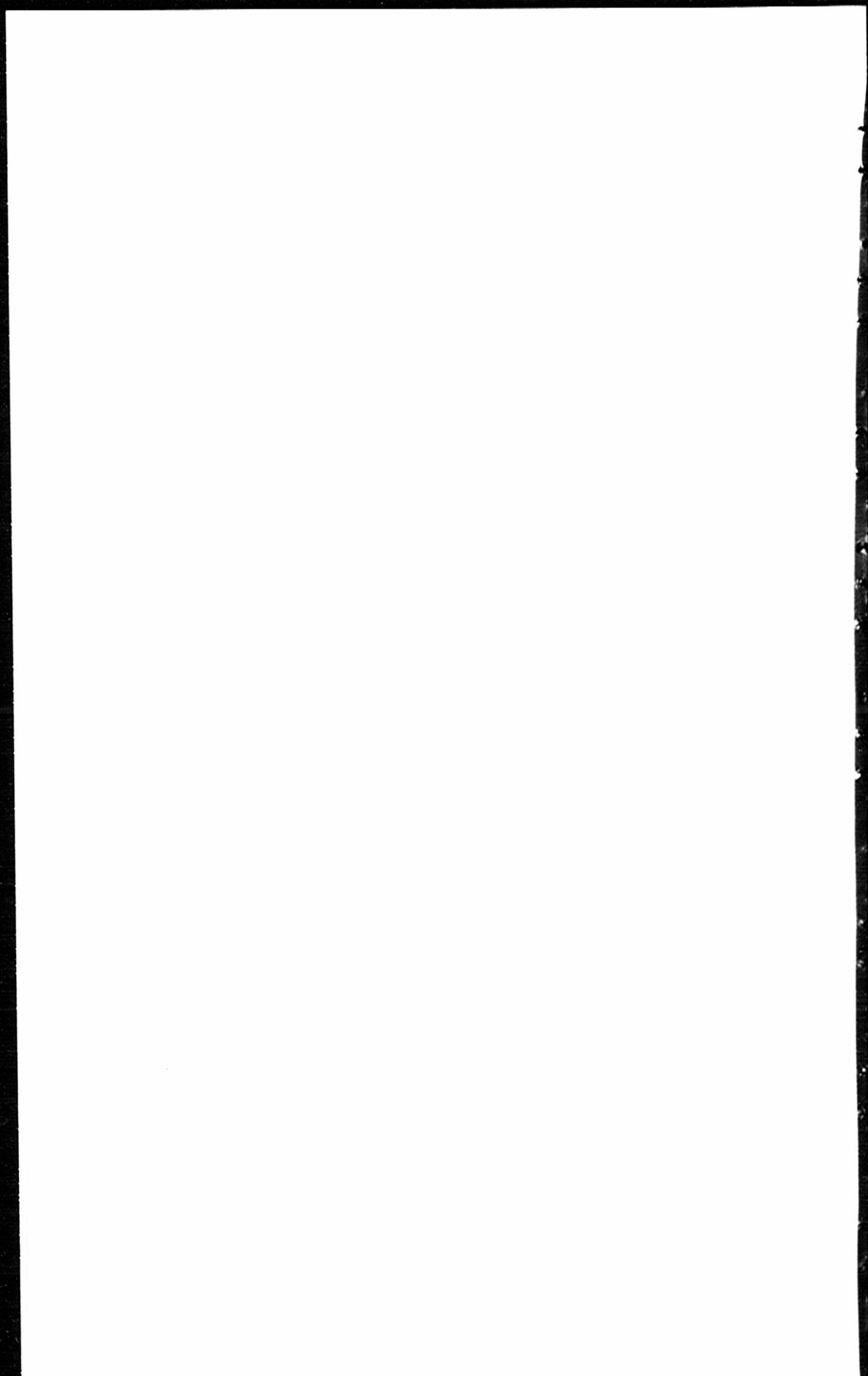
1. Was there sufficient evidence for reasonable men to find beyond a reasonable doubt that Herbert Macklin was guilty as charged.

# INDEX

|                                                                                                                                                                       | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Counterstatement of the Case .....                                                                                                                                    | 1    |
| The Government's direct case .....                                                                                                                                    | 2    |
| Herbert Macklin's defense .....                                                                                                                                       | 5    |
| Statutes Involved .....                                                                                                                                               | 6    |
| Summary of Argument .....                                                                                                                                             | 8    |
| Argument:                                                                                                                                                             |      |
| I. There was ample evidence from which reasonable men<br>might or might not fairly find beyond a reasonable<br>doubt that Herbert Macklin was guilty as charged ..... | 9    |
| Conclusion .....                                                                                                                                                      | 13   |

## TABLE OF CASES

|                                                                                                                           |       |
|---------------------------------------------------------------------------------------------------------------------------|-------|
| <i>Allen v. United States</i> , 164 U.S. 492 (1896) .....                                                                 | 12    |
| <i>Bailey et al. v. United States</i> , D.C. Cir. Nos. 20,623, 20,624,<br>20,625, 20,629, decided December 14, 1967 ..... | 12    |
| <i>Campbell v. United States</i> , 115 U.S. App. D.C. 30, 316 F.2d<br>681 (1963) .....                                    | 11    |
| <i>Cooper v. United States</i> , 94 U.S. App. D.C. 343, 218 F.2d<br>39 (1954) .....                                       | 11    |
| <i>Crawford v. United States</i> , 126, U.S. App. D.C. 156, 375<br>F.2d 332 (1967) .....                                  | 9, 12 |
| <i>Curley v. United States</i> , 81 U.S. App. D.C. 389, 160 F.2d<br>229, cert. denied, 331 U.S. 837 (1947) .....          | 9, 12 |
| <i>Glasser v. United States</i> , 315 U.S. 60 (1942) .....                                                                | 12    |
| <i>Goodwin v. United States</i> , 121 U.S. App. D.C. 9, 347 F.2d<br>793, cert. denied, 382 U.S. 855 (1965) .....          | 11    |
| <i>Hall v. United States</i> , 83 U.S. App. D.C. 166, 168 F.2d 161,<br>cert. denied, 334 U.S. 853 (1948) .....            | 13    |
| <i>Haynes v. United States</i> , 36 L.W. 4146 decided January<br>29, 1968 .....                                           | 2     |
| <i>Ladrey v. United States</i> , 81 U.S. App. D.C. 127, 155 F.2d<br>417, cert. denied, 329 U.S. 723 (1946) .....          | 13    |
| <i>Miller v. United States</i> , 116 U.S. App. D.C. 45, 320 F.2d<br>767 (1963) .....                                      | 12    |
| <i>(Fletcher) Smith v. United States</i> , 123 U.S. App. D.C. 259,<br>359 F.2d 243 (1966) .....                           | 12    |
| <i>Wood v. United States</i> , 120 U.S. App. D.C. 163, 344 F.2d<br>548 (1965) .....                                       | 12    |



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21,143

---

HERBERT J. MACKLIN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

No. 21,144

---

FRANK MACKLIN, JR., APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia

---

BRIEF FOR APPELLEE

---

## COUNTERSTATEMENT OF THE CASE

On June 6, 1966 an indictment was returned charging appellant Frank Macklin, Jr., with robbery,<sup>1</sup> assault

---

<sup>1</sup> 22 D.C. Code § 2901.



with a dangerous weapon,<sup>2</sup> and possession of an unregistered firearm,<sup>3</sup> e.g. a sawed-off shotgun. The same indictment charged appellant Herbert Macklin with robbery and assault with a dangerous weapon. On March 14, 1967 the appellants went to trial together before Judge Leonard P. Walsh and a jury. The trial resulted in both the appellants being found guilty as indicted. Appellant Frank Macklin, Jr., was sentenced to serve from five (5) to fifteen (15) years on each of the robbery counts (counts 1 and 3), and three (3) to ten (10) years on the assault with a dangerous weapon counts (counts 2, 3 and 4). These sentences were to run concurrently. Appellant Frank Macklin, Jr. was also sentenced to serve from eighteen (18) months to fifty-four (54) months for possession of an unregistered firearm (count 6). This sentence on count 6 ran consecutively to his other sentences. Appellant Herbert Macklin was committed to the custody of the Attorney General for a period not to exceed ten (10) years on each count under the Youth Corrections Act.<sup>4</sup> These sentences were to run concurrently. This consolidated appeal followed.

#### The Government's direct case

The evening of Saturday, April 9, 1966 at approximately 7:30 p.m. Robert Gregory who was employed as a delivery man at the Wilcox Liquor Store at 3225

<sup>2</sup> 22 D.C. Code § 502.

<sup>3</sup> 26 U.S. Code § 5851. In view of the Supreme Court's decision in *Haynes v. United States*, 36 L.W. 4146 decided January 29, 1968, the Government concedes for the purpose of this appeal that appellant Frank Macklin, Jr. had a complete defense to count six of the indictment in this case. In *Haynes*, The Supreme Court held that a proper claim of the Constitutional privilege against self-incrimination provides a full defense to prosecution either for failure to register a firearm under 26 U.S.C. 5841 or for possession of an unregistered firearm under 26 U.S.C. 5851. Although the appellant Frank Macklin, Jr., did not specifically raise the Fifth Amendment as a defense in this case, the Government concedes for the purposes of this appeal that he would have done so had he known that a proper claim of the privilege constituted a full defense to the charges against him.

<sup>4</sup> 18 U.S. Code § 5010(c).

Georgia Avenue, N.W. observed a red Corvair with three men in it parked near the front of that store (Tr. 52). Mr. Gregory was in the process of making deliveries and at first did not pay too much attention to the car. But when Mr. Gregory had finished making his last delivery at approximately 8:30 p.m. he observed the same car in the alley at the rear of the store (Tr. 53). Before entering the store Mr. Gregory who had become suspicious took a mental note of the first four digits of the car's license (Tr. 53).<sup>5</sup> He also observed that there was only one person seated in the car and that person was seated in the front passenger's seat. Although he did not see this man's face, Mr. Gregory testified that the back of the sweater he wore was a light color (Tr. 57-58). As he was walking into the store, Mr. Gregory observed a man later identified as Frank Macklin, Jr. and another man later identified as Donald Brown in a phone booth just outside the store (Tr. 54, 59-60). Frank Macklin, Jr. and Donald Brown followed Mr. Gregory into the store at which time Mr. Gregory observed that Brown had a pistol. Mr. Gregory then started out of the store to reach the phone (Tr. 55). At this point appellant Frank Macklin, Jr. approached Mr. Gregory with a sawed-off shotgun and said (Tr. 55):

"If you want to be smart you will come back in."

Mr. Gregory walked back into the store and was directed by appellant Frank Macklin, Jr. to go to the rear of the store where approximately forty-five (\$45) or fifty (\$50) was taken from him by appellant Frank Macklin, Jr. (Tr. 55, 58). Mr. Gregory was instructed to lie down on the floor at the rear of the store. Later either Frank Macklin, Jr. or Donald Brown brought Mr. Robert Gartler, a co-owner of the K-R Corporation which owned the Wilcox Liquor Store, and his wife back to where Mr. Gregory was lying. One of these two robbers said to Mr. Gregory "I ought to kill you for being so smart."

---

<sup>5</sup> The numbers were 194-6.

(Tr. 55). But after Mr. Gartler had plead with the robber to leave Mr. Gregory alone, Mr. Gregory was left unharmed.

While appellant Frank Macklin, Jr. was robbing Mr. Gregory, Donald Brown leaped across the counter with his revolver in hand and directed Mr. Gartler to open the safe. He then directed Mrs. Gartler to take all the money out of the safe (Tr. 132-133). Approximately \$2,600 (twenty-six hundred dollars) was taken from the store, together with two bottles of whiskey with the store stamp on them (Tr. 136-138). Mr. Gartler also identified Frank Macklin, Jr. as the robber with the sawed-off shotgun. After the two robbers left the store, Mr. Gartler immediately called the police to report the crime (Tr. 57).

Less than one hour after the robbery, police officers Dory, Childers and Denham observed a red Corvair with 194-6 as the first four numbers of the license plate cruising in the 2000 block of 1st Street N.W. (Tr. 161). This car matched the description given of the lookout they had received for the car involved in the holdup of the Wilcox Liquor Store (Tr. 161). The officers stopped the car and ordered the occupants out (Tr. 162). Appellant Frank Macklin, Jr. was behind the wheel of the Corvair (Tr. 162-163), Herbert Macklin was on the passenger side of the front seat (Tr. 163), and Donald Brown was sitting in the back seat directly behind the driver (Tr. 164). As the officers approached, Herbert Macklin was pushing something underneath the seat of the car (Tr. 202, 212-213).

As Herbert Macklin was being searched by Officer Dory, he pulled out a package which contained a stack of money in mostly ten, five and twenty dollar bills (Tr. 164, 171). At that point Donald Brown began to scuffle and attempt to escape from Officer Childers, and Herbert Macklin began to struggle with Officer Dory (Tr. 163-164). Donald Brown swung at Officer Childers and forcefully broke loose from Officer Childers and was shot (Tr. 165, 202-203). Herbert and Frank Macklin, the ap-



pellants in this case continued struggling with the police officers and the money Herbert Macklin had pulled from his pocket was scattered all over the street (Tr. 166).

The officers found a fully loaded .32 caliber pistol which was identified as being similar to the holdup pistol under the front seat of the car on the passenger's side (Tr. 165, 169). They also found the two whiskey bottles which had been stolen in the holdup approximately one hour earlier. These bottles were in plain view on the front seat where Frank and Herbert Macklin had been sitting (Tr. 166, 169, 203). They recovered a loaded sawed-off shotgun which was identified as the one used in the holdup sticking out from under the front passenger seat where Herbert Macklin had been sitting (Tr. 167-168). Some coins and some dollar bills of various denominations were also found on the front seat and floor of the auto (Tr. 166, 169-170). Approximately \$1,275.00 was recovered including \$130.55 in coin change (Tr. 170). A search of appellant Frank Macklin after arrest disclosed that he was carrying bullets, a 12 gage shotgun shell, and a stocking mask (Tr. 178). At the time of his arrest Herbert Macklin wore a sweater type jacket with a light cream or tan background (Tr. 173-174).

#### Herbert Macklin's defense

Herbert Macklin took the stand to testify in his own behalf. He testified that he came out of a liquor store the night of the holdup and saw his father driving up Florida Avenue (Tr. 221). He got into the front seat of the car to get a ride home (Tr. 221). A few minutes later his father stopped the car to pick up Donald Brown who said he was going to the 2000 block of First Street. Brown, according to appellant Herbert Macklin's testimony, sat in the back seat and put the two stolen liquor bottles between the two appellants who were both seated in the front seat (Tr. 222). Appellant denied that he had taken the money out of his pocket and thrown it on the street. Instead, he said that Officer Dory took the

money out of his pocket (Tr. 223, 237). He testified that he only had about \$75 on his person when arrested. He denied seeing all the money and change which was scattered around the car (Tr. 236). He denied bending down to push something under the front seat just as Officer Childers approached the car (Tr. 236). He denied ever seeing the sawed-off shotgun which was protruding from under the car seat, or the pistol which was under the seat (Tr. 237). He said that he did not know that his father had revolver shells and a stocking mask in his possession (Tr. 240). He denied that a large bundle of bills had been scattered all over the street, and said that Officer Dory dropped four or five bills (Tr. 241). Appellant also denied that he participated in the holdup in any way.

#### STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months or more than fifteen years.

Title 22, District of Columbia Code, Section 502, provides:

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 26, United State Code, Section 5851, provides:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5841, or 5846, or which has at any time



been made in violation of section 5841, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

Chapter 26 United States Code Section 5848(1)

The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches of length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such a firearm is included within the foregoing definition.

Chapter 26 United States Code Section 5848(4)

The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each pull of the trigger.

Title 26, United States Code, Section 5861, provides:

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than \$2,000.00 or be imprisoned for not more than five years, or both, in the discretion of the Court.

## SUMMARY OF ARGUMENT

## I

There was ample evidence for the jury to find Herbert Macklin guilty beyond a reasonable doubt. Three people were seen in the holdup car one hour before the holdup. Two went into the store and the third remained outside in the front seat of a holdup car and presumably acted as a lookout. This lookout wore a sweater which was light in color when viewed from the rear. Appellant Herbert Macklin was arrested in the holdup car less than one hour after the holdup. He wore a sweater which was light in color when viewed from the rear. He was sitting in the front passenger seat and when the police officers approached he pushed something under the seat. When the car was searched contemporaneously with the arrest, the sawed-off shotgun and the fully loaded .32 calibre pistol used in the holdup were found under the seat where appellant was sitting. The sawed-off shotgun was protruding from under the seat and was therefore partially in plain view. The other two men in the car at the time of appellant's arrest, Frank Macklin, Jr. and Donald Brown, were both identified as the armed holdup men who went into the Wilcox Liquor Store and escaped with over two thousand dollars in bills and change. When appellant, Herbert Macklin, was taken out of the car he pulled a wad of money consisting of five, ten and twenty dollar bills from his pocket and scattered it over the street. He also engaged in a struggle with police officers in an apparent effort to escape. Appellant Herbert Macklin did not explain how he came to possess this wad of money. In fact at trial he denied possessing over seventy-five dollars at the time of arrest. On this record there was ample evidence from which reasonable men might or might not conclude that Herbert Macklin was the third man who acted as the lookout in the holdup of the Wilcox Liquor Store.

## ARGUMENT

- I. There was ample evidence from which reasonable men might or might not fairly find beyond a reasonable doubt that Herbert Macklin was guilty as charged

(Tr. 52, 55, 57-58, 132, 133, 140, 165, 167-172, 175, 202, 203, 212-213)

On a motion for judgment of acquittal, that trial court and this Court must view the evidence in the light most favorable to the Government's position in order to determine whether reasonable persons might or might not find guilt beyond a reasonable doubt. *Crawford v. United States*, — U.S. App. D.C. —, 375 F.2d 332, 334 (1967); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947). The Government contends that, under the evidence at the close of its case in chief, and disregarding the testimony after the motion, reasonable men might or might not have a reasonable doubt as to the guilt of Herbert Macklin. Therefore the trial court was correct in denying the motion for judgment of acquittal. *Crawford v. United States*, *supra*.

The Government presented a substantial case of circumstantial evidence against the appellant Herbert Macklin. Mr. Gregory testified that then when he first observed the red Corvair parked in front of the Wilcox Liquor Store there were three men inside it (Tr. 52). Approximately one hour later when the other two robbers, Frank Macklin, Jr. and Donald Brown had left the car to rob the store, Mr. Gregory observed that there was still one person sitting in the front passenger seat of the holdup car. He observed that this person wore a sweater which was light in color when observed from the rear (Tr. 57-58). Thus the Government established that three men were involved in the holdup. Two of these men went inside and the third stayed in the car as a lookout.

The two holdup men who went into the store were identified as appellant Frank Macklin, Jr. and the deceased Donald Brown (Tr. 55, 132-133, 140). Less than an

hour after the holdup, appellant Herbert Macklin concedes that he was found by police in the holdup car with these two men who were identified as being the holdup men who entered the store. He was sitting in the front passenger's seat wearing a sweater which was light in color when viewed from the rear (Tr. 175). As Officer Childers approached the car he observed appellant Herbert Macklin make a move as if he was pushing something under the front seat (Tr. 202, 212-213). Minutes later the officers found the sawed-off shotgun and the fully loaded .32 caliber pistol which were identified as the guns used in the holdup under the front passenger seat where Herbert Macklin had been sitting (Tr. 165, 167-169). The sawed-off shotgun was protruding from underneath the seat and thus was in plain view to anyone sitting there (Tr. 165). Two bottles of whiskey recently stolen from the store in question were in plain view on the front seat of the car between where Herbert Macklin and Frank Macklin, Jr. were sitting when they were stopped by the police (Tr. 166, 169, 203). Some dollar bills and various coins were scattered all over the front seat and front floor of the car and were recovered by police (Tr. 166, 169-17). When Herbert Macklin was taken out of the car by Officer Dory he pulled a wad of bills from his pocket and scattered them all over the area (Tr. 166). The exact amount of money that was in this wad of bills is not certain but Officer Dory testified that most of the bills were tens and fives with some twenties (Tr. 171). The approximate size of the wad was illustrated to the jury by Officer Dory (Tr. 172). Appellant admits that the Government's evidence was sufficient to allow the jury to find that the sum he possessed and threw away was substantially more than the \$75 he admitted possessing (Appellant's Br. p. 20). There was also evidence that Herbert Macklin began to struggle with the police in an apparent effort to escape and that Officer Dory needed help from Officer Bracy from the robbery squad to subdue him (Tr. 165).

Appellant is not aided by the cases which he cites where this Court has held that the evidence only showed sus-



picion or was such that the jury could only speculate as to guilt. The only connection of the defendant with the holdup in *Cooper v. United States*, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954), was that he was paying for and had driven the car identified as the holdup car and that a fingerprint of his was found on the steering wheel of the car. There was no evidence of when his fingerprint was put on the steering wheel. Here, the appellant was in the holdup car less than one hour after the holdup with a substantial amount of unexplained funds in his possession and weapons used in the holdup in plain view. In *Cooper*, *supra*, there was no evidence associating the defendant with the stolen goods immediately after the robbery. Here, the Government's evidence disclosed that appellant was caught in the car with the loot from the holdup and that he attempted to get rid of the unexplained funds in his possession and escape from the police after being apprehended. In *Goodwin v. United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, *cert. denied*, 382 U.S. 855 (1965), the only evidence against the defendant Paul Vaughn was that he was in the holdup car as a passenger an hour after the holdup in another part of the city. There was no evidence as there is in this case that Vaughn even knew of the stolen goods being in the car or that Vaughn had a large wad of funds which he tried to dispose of when apprehended by police. Similarly in *Cambell v. United States*, 115 U.S. App. D.C. 30, 316 F.2d 681 (1963), the primary evidence connecting defendant Cambell with the robbery was that he knew the identified robber and was seen with him shortly after the crime and that his fingerprint was found on the steering wheel of the robbery car. An expert witness testified that the fingerprint could have been on the wheel for weeks before being discovered. Campbell was never placed in the getaway car, and he was never found in possession of loot or weapons involved in the robbery.

The jury had ample evidence to conclude that the wad of money that Herbert Macklin tried to dispose of at the time of his arrest was proceeds from the recent robbery.

Here, as in *Bailey, et al v. United States*, D.C. Cir. Nos. 20,623, 20,624, 20,625, 20,629 decided December 14, 1967 the fact that appellant was in possession of a large amount of unexplained funds is strong probative evidence especially when coupled with his attempt to dispose of this evidence when apprehended by the police. Although the cash here was fungible and could not be identified by serial number or denomination, bills and coins were spread all over the car indicating that the three men had just divided the proceeds of the robbery. Certainly appellant did not give an adequate explanation for his possession of this wad of money.

The jury could infer from Herbert Macklin's possession of these recently stolen funds that he was part of the criminal venture. See *Wood v. United States*, 120 U.S. App. D.C. 163, 344 F.2d 548 (1965); (*Fletcher*) *Smith v. United States*, 123 U.S. App. D.C. 259, 359 F.2d 243 (1966). Yet there was additional evidence to establish appellant's guilt. He wore the same shade sweater as the lookout man (Tr. 57-58, 175). He apparently tried to conceal the weapons as the police approached, and later tried to escape and dispose of the bundle of cash (Tr. 202, 212, 213). This evidence of flight and concealment does not create a presumption of guilt, but it can be considered by the jury in tending to prove appellant's consciousness of guilt. *Allen v. United States*, 164 U.S. 492, 498-499 (1896); *Miller v. United States*, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963).

The Government's evidence although primarily circumstantial was substantial. When viewed in a light most favorable to the Government's position, *Curley v. United States, supra*, and giving due regard to the jury's function to weigh evidence and determine the credibility of witnesses, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the evidence was such that twelve reasonable men might or might not find guilt beyond a reasonable doubt. *Crawford v. United States, supra*, 375 F.2d at 334. The trial court was correct in denying Herbert Macklin's motion for judgment of acquittal.

Moreover, appellant Herbert Macklin's testimony at trial if anything strengthened the Government's case. By offering such testimony after denial of the motion for judgment of acquittal, appellant waived his challenge to the Government's *prima facie* case and the appeal comes upon the record as a whole. *Hall v. United States*, 83 U.S. App. D.C. 166, 169, 168 F.2d 161, 164 *cert. denied*, 334 U.S. 853 (1948); *Ladrey v. United States*, 81 U.S. App. D.C. 127, 130, 155 F.2d 417, 420, *cert. denied*, 329 U.S. 723 (1946). By denying that he had scattered the wad of money and tried to escape; and by further denying that he had any knowledge of the weapons and loot being in the car, Herbert Macklin contradicted the testimony of Officers Dory and Childers. Moreover, appellant's testimony that his father picked up Donald Brown to give him a ride almost one hour after the holdup is unlikely in view of the testimony of the complainants that both Frank Macklin and Donald Brown were together during the holdup.

### CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,  
*United States Attorney.*

FRANK Q. NEBEKER,  
WILLIAM G. REYNOLDS,  
*Assistant United States Attorneys.*

REPLY BRIEF FOR APPELLANT

---

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,143

HERBERT MACKLIN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

---

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAY 28 1968

*Nathan J. Paulson*  
CLERK

Robert E. Sher  
888 17th Street, N. W.  
Washington, D. C.

Attorney for Appellant  
(Appointed By This Court)



IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21,143

---

HERBERT MACKLIN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

---

Appeal from Judgment of the  
United States District Court  
for the District of Columbia

---

REPLY BRIEF OF APPELLANT  
HERBERT MACKLIN

---

The opinions of this Court in two cases decided on May 2, 1968, support the position of appellant in this case.

In Vaughn v. United States (No. 21,066) and Worrell v. United States (No. 21,067) robbery convictions based very largely on appellants' possession of complainant's watch were reversed for insufficiency of evidence. In a footnote to the opinion, an instruction that the jury might infer, from their possession of recently stolen property, that the defendants were guilty of robbery was disapproved for the following reason:

"The trouble with this charge is that it implies that all the elements of the robbery, including that of a forceful taking, can be presumed from the fact of possession. Such possession, however, supports only the inference that the defendants took the property belonging to the owner; that such taking was accomplished in a manner which amounted to robbery must be established by independent evidence."

In Blair v. United States (No. 21,033), decided the same day, approval was given to the following instruction on aiding and abetting:

"Now, a person aids and abets another in the commission of a crime if he knowingly associates himself in some way with the criminal venture with the intent to commit the crime and participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed.

\* \* \* \* \*

"So conduct by a defendant of an affirmative character in furtherance of a common criminal design, scheme or purpose is necessary." (Emphasis added)

This instruction does not differ materially from that given by the district court in this case to the effect that appellant may not be convicted as an aider and abetter unless the jury finds beyond a reasonable doubt that he participated in furtherance of the criminal act "either before or at the time it was committed." (Tr. 325-26).

What is completely lacking here is evidence that appellant participated in furtherance of the criminal act "before or at the

time it was committed." The Government's case against this appellant is based almost entirely on the fact that he was in the company of the two robbers approximately an hour after the robbery with a substantial amount of unexplained funds in his possession. The evidence is uncontradicted that he did not actively participate in the robbery. Therefore the funds in his possession, assuming they were the stolen funds, must have been handed to him after the robbery. It is just as reasonable to assume that these funds were turned over to him by his father just as the police car approached the red Corvair as to infer that they were given to him immediately after the robbery. Indeed, the former would seem to be much the more reasonable inference in the light of the following facts.

Mr. Gertler testified that the robbers obtained approximately \$2600 from the liquor store (Tr. 136). Officer Dory testified that approximately \$1275 was picked up at the scene of the arrest after the money was scattered about in the wind by appellant (Tr. 170). This is just under one-half of the money that was stolen. It would indicate that the loot was divided two ways instead of three ways. The other robber, decedent Brown, had money in his possession though the amount is not shown by the evidence (Tr. 204). Appellant Frank Macklin, Jr. had no money on him (Tr. 187). It hardly seems likely that a nonparticipant in the robbery got half of the proceeds while one of the active participants got

none. A much more reasonable theory is that the two active participants divided the loot between them and that appellant's father turned his share over to appellant when he observed the police car approaching.

The Government's theory is that this appellant's function in the robbery was that of "lookout". But that is hardly a correct characterization of what he did, even assuming that he was the unidentified third man in the car. The evidence is undisputed that the red Corvair was parked in the alley to the rear of the liquor store at the time of the robbery. The evidence is likewise undisputed that the only entrance to the liquor store was through the front door which opened onto Georgia Avenue (Tr. 148). There was no back door to the store (Tr. 148). What a man in a car parked in an alley to the rear of the store could be a "lookout" for is hard to imagine.

Nor was appellant the driver of the get-away car. The evidence shows that his father was driving when the police car approached. It could hardly be contended that appellant, who was 18 years old at the time, masterminded a robbery in which his father and another adult actively participated. Hence, the most that can be said of appellant, even assuming that he was the unidentified third man who was sitting in the parked car in the alley, is that he was present near the scene of the crime and that



he may have been in sympathy with the persons committing it. That, under the instructions of the court in this case, does not make him an aider and abetter (Tr. 325).

The Government asserts in its brief (p. 4) that as the police officers approached the car, appellant was pushing something under the front seat. Officer Childers did so testify on direct examination (Tr. 202). But this testimony was sharply modified if not completely reversed in his cross-examination, which follows (Tr. 212-13):

"Q. When you say you saw Herbert Macklin pushing something underneath the front seat of the car where were you standing?

A. I was standing in the rear of the car, I would say, about five feet.

Q. And you were looking in through the back window?

A. That is correct.

Q. You didn't know if he was leaning over, you couldn't see his arm, could you?

A. No.

Q. You didn't know if he was pushing or just bending over?

A. That is correct. It appeared from motions of the shoulders--

Q. But you couldn't see his arms and he could have been just bent over; is that correct?

A. That is correct."

Thus it is not correct to say that the evidence showed that appellant was pushing something under the front seat as the officers approached. It is true that a sawed-off shotgun and a 32 caliber pistol were found under the front seat where appellant was sitting, but it is clear that the pistol was not in plain sight and it is far from clear that the shotgun was. In any event, this appellant has not been charged with possession of either of the guns.

The fact that two bottles of whisky were found on the front seat of the car adds nothing to the Government's case against this appellant. There was nothing on either of the bottles to indicate that it was stolen. The identification mark on the bottles is a standard type of identification that appears on every bottle of whisky sold in the District of Columbia.

In sum, this Court has repeatedly held that not only must guilt be established beyond a reasonable doubt but that each and every element of the offense must be established beyond a reasonable doubt. Here appellant's participation in the robbery of the liquor store was not established beyond a reasonable doubt. As this Court held in Vaughn v. United States, supra, possession of stolen property (if such it be) is not enough. There must be independent evidence that the defendant participated in the forceful taking in a manner which amounted to robbery. That

evidence is lacking here.

A directed verdict of acquittal should have been entered at the close of the Government's case.

Respectfully submitted,

Robert E. Sher  
888 - 17th Street, N.W.  
Washington, D.C.

Attorney for Appellant  
By Appointment of This Court